

2532
No. 11927

United States
Circuit Court of Appeals
For the Ninth Circuit.

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, AND UNITED
STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona **FILED**

JUL - 2 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

GUST, ROSENFELD, DIVELBESS,
ROBINETTE and LINTON,

Security Building,
Phoenix, Arizona.

Attorneys for Appellant.

F. E. FLYNN,

United States Attorney,
Phoenix, Arizona.

CUNNINGHAM & CARSON,

419 Title & Trust Building,
Phoenix, Arizona,

Attorneys for Appellees. [3*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

Patsy O'Rourke Kendig, vs.

Phoenix Civil Docket

Civ-863 Phx.

PATSY O'ROURKE KENDIG, A Widow,
Plaintiff,
vs.

MARY BOONE KENDIG, a widow, and UNITED
STATES OF AMERICA,
Defendants.

FILINGS-PROCEEDINGS

Date

1946

May 15—File plaintiff's complaint

May 15—File plaintiff's praecipe for summons

May 15—Issue summons

June 19—File summons to United States of America
returned by Marshal showing service on
defts.

June 20—File deft. Kendig's Answer

July 15—File Answer of United States of America
by F. E. Flynn, U. S. Atty.

1947

Mar. 31—File plaintiff's Motion to Set for trial and
notice for hearing for April 7, 1947.

Apr. 8—Docket proceedings had 4/7/47. Plaintiff's
Motion to set trial on reg. for hearing.
Linton pres. for plaintiff and requests
jury trial. McAlister pres. for Govt. No
appearance for deft. Mary Boone Kendig.
Order set for trial Sept. 9, 1947, at ten
o'clock a.m.

1947

Apr. 8—Issue notice to counsel

Sept. 2—Harold Divelbess pres. for pltf. Gene Cunningham pres. for deft. Mary Boone Kendig. On stipulation of counsel order vacate order setting this case for trial Sept. 9, 1947, and order set for trial Tues., Oct. 7, 1947, at ten a.m.

Sept. 25—Harold Divelbess for pltf. Gene Cunningham for deft. Mary Boone Kendig. Chas. B. McAlister, for Govt. On motion McAlister, opposing counsel consenting thereto, Order vacate order setting this case for trial Oct. 7, 1947, and order set for trial Oct. 28, 1947, at ten a.m.

Oct. 2—File Deposition of Geo. Kendig

Oct. 28—On reg. for trial. Pltf. pres. with counsel Harold Divelbess and Walter Linton. Deft. Mary Boone Kendig pres. with her counsel Gene S. Cunningham and Wm. Messinger. Chas. B. McAlister pres, for Govt. Billar pres. as reporter. Lawful jury of 12 persons empaneled to try case. Enter proceedings of trial. File pltf's Exhibits Nos. 1 to 3 incl. and deft. Kendig's Exhibit A. Counsel for deft. Kendig now moves to strike portions of pltf's Exhibit 1, on ground same is hearsay and conclusions of witness and moves for dismissal of cause of action on account of insufficient evidence. Order motions submitted and taken under advisement. At 3:15 p.m.

1947

recess to 10 a.m. Oct. 29, 1947. On motion McAlister, order allow veterans Adm. to withdraw deft. Kendig's Exhibit A on substituting of Photostat copy thereof.

Oct. 28—File jury list

Oct. 29—On reg. for further trial. All pres. pursuant to recess and further trial now had. Enter proceedings of trial. Cunningham on behalf of deft. Mary Boone Kendig now moves for directed verdict; Order motion for directed verdict granted. Jury is now instructed to return verdict for defts. Foreman of jury appointed, and verdict signed, and presented: "We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the defendants." Verdict recorded, and jury discharged.

Oct. 29—Enter and file verdict "for defendants"

Nov. 7—Order form of judgment for defts. approved as to form by all counsel herein, be filed, entered and spread on minutes as the judgment in this case, as follows.

Nov. 7—Enter and file judgment for defts. on directed verdict. (Notation of judgment made in Civil docket 11/7/47).

Nov. 15—File Plaintiff's Motion for New Trial and Memo. in Support thereof.

Nov. 25—File Memo. of deft. Mary Boone Kendig, in reply to Memo. of pltf. on Motion for New Trial

1948

Jan. 13—Pltf's Motion for a New Trial having been submitted and taken under advisement, it is ordered that said motion for New Trial be and it is denied. (Notation made in civil docket 1/13/48.)

Jan. 13—Issue notice to counsel.

Mar. 30—File reporter's transcript in duplicate

Mar. 30—File pltf's Notice of Appeal

Mar. 30—Fwd. copy of Notice of Appeal to F. E. Flynn, U. S. Atty. and Cunningham and Carson, attys. for deft. Kendig.

Mar. 30—File bond on Appeal in sum of \$250.00 with Fidelity and Deposit Co. of Maryland as surety thereon.

Mar. 31—File pltf's Designation of Portions of Record and Proceedings to be contained in Record on Appeal.

May 4—Enter and file Order for Transmittal of Certain Original Exhibits and Reporter's Transcript to Circuit Court of Appeals.

In the District Court of the United States
for the District of Arizona

No. Civil 863, Phoenix

PATSY O'ROURKE KENDIG, a Widow,
Plaintiff,
vs.

MARY BOONE KENDIG, a Widow, and UNITED
STATES OF AMERICA,
Defendants.

COMPLAINT

Comes now the plaintiff, and for cause of action
alleges:

I.

That plaintiff and defendant, Mary Boone Kendig, are residents of Phoenix, Maricopa County, Arizona;

That this action is brought by the plaintiff as the surviving widow of Wiley SoRelle Kendig, deceased, to recover as beneficiary under a National Service Life Insurance Policy issued on the life of Wiley SoRelle Kendig, pursuant to the provisions of the National Service Life Insurance Act of 1940, c. 757, Title VI, Part 1, 54 Stat. 1014; 38 U.S.C.A. Ch. 13; that both the plaintiff, Patsy O'Rourke Kendig and the defendant, Mary Boone Kendig, claim to be the beneficiary under said policy; that the claim of plaintiff has heretofore been filed with the Director of Insurance, Veterans Administration,

and denied; that sixty (60) days have not elapsed since the date of disallowance of plaintiff's claim. That by reason of the foregoing facts, the jurisdiction of this court is invoked pursuant to the provisions of Sec. 38 U.S.C.A. 817 and 38 U.S.C.A. 445.

II.

That Wiley SoRelle Kendig enlisted in the United States Navy in July, 1941; that thereafter, upon application, he was granted Ten Thousand (\$10,000.00) Dollars National Service Life Insurance, effective August 21, 1941, for which his mother, the defendant, Mary Boone Kendig was designated beneficiary.

That thereafter, on November 29, 1943, the said Wiley SoRelle Kendig and the plaintiff, Patsy O'Rourke Kendig were married; that subsequent to his marriage to plaintiff, the said Wiley SoRelle Kendig changed the beneficiary on his policy of National Service Life Insurance, designating his wife, Patsy O'Rourke Kendig, plaintiff herein, as beneficiary.

III.

That on March 23, 1944, the said Wiley SoRelle Kendig was killed; that thereafter, both the plaintiff and the defendant, Mary Boone Kendig, filed claims for said insurance. That the Director of Insurance, Veterans Administration, has denied the claim of plaintiff.

That plaintiff has been informed, and believes, and upon such information and belief alleges that

the said Wiley SoRelle Kendig took such steps as were necessary to effect a change of beneficiary on his policy of National Service Life Insurance from the defendant, Mary Boone Kendig to the plaintiff.

IV.

That subsequent to the death of the said Wiley SoRelle Kendig, there was born to the plaintiff as the issue of the marriage of plaintiff and said Wiley SoRelle Kendig, a son:

That National Service Life Insurance was made available by the United States Government to provide benefits for the dependents of those killed while serving in the armed forces of the United States; that the [7] marriage of plaintiff with the said Wiley SoRelle Kendig, and the subsequent birth of a son, the issue of said marriage, notwithstanding the rules and regulations of the Director of Insurance, Veterans Administration, as a matter of law constitutes a revocation of the designation of beneficiary made by the said Wiley SoRelle Kendig, prior to his said marriage.

Wherefore, plaintiff prays judgment of this court:

- (1) Finding and declaring plaintiff to be the beneficiary of the policy of National Service Life Insurance issued on the life of Wiley SoRelle Kendig, now deceased;
- (2) Or, that the designation of beneficiary made by the said Wiley SoRelle Kendig, prior to

his marriage with plaintiff was, by reason of his marriage and the birth of a son, revoked as a matter of law;

(3) And for such other orders as are proper in the premises.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
and LINTON,
By HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

State of Arizona,
County of Maricopa—ss.

Patsy O'Rourke Kendig, being first duly sworn upon oath deposes and says:

That she is the plaintiff herein; that she has read the foregoing complaint and knows the contents thereof; that the matters and things therein alleged are true; except as to such matters as are alleged upon information and belief, and as to those, she believes them to be true.

PATSY O'ROURKE KENDIG.

Subscribed and sworn to before me this 14th day
of May, 1946.

[Seal] HAROLD L. DIVELBESS,
Notary Public.

My Commission expires Dec. 27, 1948.

[Endorsed]: Filed May 15, 1946. [8]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Mary Boone Kendig, a widow, by her attorneys Messrs. Cunningham & Carson and answering plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of plaintiff's complaint.

II.

Admits that Wiley SoRelle Kendig enlisted in the United States Navy in July, 1941, and that he was thereafter granted Ten Thousand Dollars (\$10,000) National Service Life Insurance effective August 21, 1941, for which his mother, the defendant Mary Boone Kendig, was designated beneficiary, and admits that on November 29, 1943, the said Wiley SoRelle Kendig and the plaintiff Patsy O'Rourke were married, but denies that subsequent to his marriage, or at any time, the said Wiley SoRelle Kendig changed the beneficiary on his policy of National Service Life Insurance to his wife, Patsy O'Rourke Kendig, the plaintiff, or to any other person. [9]

III.

Admits that the said Wiley SoRelle Kendig was killed on or about March 23, 1944, and that both the plaintiff and the defendant Mary Boone Kendig filed claims for said insurance and that the Director

of Insurance, Veterans' Administration, has denied the claim of plaintiff, but denies that the said Wiley SoRelle Kendig took such steps as are necessary to effect a change of beneficiary on his policy of National Service Life Insurance from the defendant Mary Boone Kendig to the plaintiff, and in connection therewith alleges that the said Wiley SoRelle Kendig failed to sign and forward a written notice of change of beneficiary to the Veterans' Administration as required by the rules and regulations of the Administrator of Veterans' Affairs, which said rules and regulations constitute part of the contract for the said National Service Life Insurance.

IV.

Admits that subsequent to the death of said Wiley SoRelle Kendig there was born to plaintiff as the issue of the marriage of plaintiff and said Wiley SoRelle Kendig, a son, but denies that the designation of beneficiary by the said Wiley SoRelle Kendig, prior to his marriage with plaintiff, was revoked as a matter of law by reason of his marriage and the birth of a son.

V.

Further answering said complaint defendant denies each and every allegation not specifically admitted or qualified.

Wherefore, defendant Mary Boone Kendig prays for judgment that plaintiff take nothing and be given no relief under her complaint and that judgment be given declaring the defendant Mary Boone

Kendig, a widow, to be the beneficiary of the policy of National Service Life Insurance carried on the life of Wiley [10] SoRelle Kendig, deceased, for her costs herein expended and for such other and further relief as to the Court may seem proper.

CUNNINGHAM & CARSON,
By GENE S. CUNNINGHAM,
Attorneys for Defendant,
Mary Boone Kendig, a Widow.

State of Arizona,
County of Maricopa—ss.

Mary Boone Kendig, being first duly sworn upon her oath, deposes and says:

That she is one of the defendants herein; that she has read the plaintiff's complaint in the above numbered and entitled cause and knows the contents thereof; that she has read the *fore-answer* and knows the contents thereof; that the matters and things in said complaint alleged which are in the foregoing answer denied, are untrue and that the matters and things affirmatively alleged in the foregoing answer are true, except as to those matters alleged upon information and belief, and as to those, she believes them to be true.

MARY BOONE KENDIG.

Subscribed and sworn to before me this 19th day
of June, 1946.

[Seal]

G. S. CUNNINGHAM,
Notary Public.

My Commission expires 5/18/50.

Received copy of the within this 19th day of June, 1946.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON,

By HAROLD L. DIVELBESS.

Copy received this 20th day of June, 1946.

CHARLES B. McALISTER,
Assistant U. S. Attorney.

By M. CRAWFORD,
Secretary. [11]

[Endorsed]: Filed June 20, 1946.

[Title of District Court and Cause.]

ANSWER

Now comes this defendant, United States of America, by F. E. Flynn, United States Attorney in and for the District of Arizona, and Francis J. McGan, Attorney, Department of Justice, and for its answer to the complaint filed herein says:

I.

This defendant admits the allegations of paragraph numbered I of plaintiff's complaint.

II.

This defendant denies the allegations of paragraph numbered II of plaintiff's complaint except to admit and allege that Wiley SoRelle Kendig en-

tered the naval service of the United States August 21, 1941 as an Aviation Cadet under serial number 114,398-2; that he was granted \$10,000 National Service Life Insurance under policy N-5,004,911 on August 21, 1941 and named Mary Boone Kendig, described as mother, as sole beneficiary; that he married Patricia E. O'Rourke, November 29, 1943; that he was killed in service in an airplane crash March 23, 1944, and on said date his policy aforesaid was in full force and effect.

III.

Defendant denies the allegations of paragraph numbered III of plaintiff's complaint except to admit and allege that Mary Boone Kendig [12] filed claim at the Veterans Administration for the benefits of the aforesaid policy, on April 5, 1944, and on March 17, 1945 was awarded benefits thereof at the rate of \$55.10 per month effective March 23, 1944 and that such award was suspended September 13, 1945; that Patsy O'Rourke filed her claim as widow of the insured for the benefits of his policy N-5,004,911 on July 18, 1944 and said claim was denied by the Veterans Administration February 2, 1946 of which she was notified by the Veterans Administration March 27, 1946.

IV.

Defendant denies the allegations of paragraph IV of plaintiff's complaint.

Wherefore this defendant, the United States of America, prays that the court upon final hearing;

- (1) Adjudge whether this defendant is obligated to pay the proceeds of policy N-5,004,911 to the plaintiff, Patsy O'Rourke Kendig (insured's widow) or to Mary Boone Kendig (his mother) and that this defendant be credited with a set-off in either event for the monthly insurance payments heretofore made to the latter.
- (2) Discharge this defendant, the United States of America, from any and all liability on policy N-5,004,911 except to the person or persons who shall be adjudged to be entitled to receive such insurance benefits.
- (3) For its costs and such further relief as to the court may seem just and proper.

/s/ **FRANK E. FLYNN,**
United States Attorney.

/s/ **CHARLES B. McALISTER,**
Assistant U. S. Attorney.

/s/ **FRANCIS J. McGAN,**
Attorney, Department of
Justice.

Receipt of copy of within pleading acknowledged
this 15th day of July, 1946.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE,
& LINTON,
IVAN ROBINETTE,
Attorneys for Plaintiff.

[Endorsed]: Filed July 15, 1946. [13]

[Title of District Court and Cause.]

Minute Entry of Tuesday, October 28, 1947

PROCEEDINGS OF TRIAL

Honorable Dave W. Ling, United States District Judge, presiding

This case comes on regularly for trial this day. The parties herein are present with their counsel. Harold Divelbess, Esquire, and Walter Linton Esquire, appear as counsel for the plaintiff. Gene S. Cunningham, Esquire and William Messinger, Esquire, appear as counsel for the defendant Mary Boone Kendig. Charles B. McAlister, Esquire, Assistant United States Attorney, appears as counsel for the United States of America. Louis L. Billar appears as official court reporter.

A lawful jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all Jurors not empaneled in the trial of this case be excused until further order.

Walter Linton, Esquire, now reads the complaint to the Jury. Gene S. Cunningham, Esquire, reads the answer of the defendant Mary Boone Kendig to the Jury. Charles B. McAlister, Esquire, now reads the answer of the defendant, United States of America to the Jury.

Walter Linton, Esquire, now states the plaintiff's case to the jury. Counsel for the defendant reserve statement to the jury.

Plaintiff's Case:

Patsy O'Rourke Kendig is now sworn and examined in her own behalf.

Plaintiff's exhibit 1, deposition of George A. Kendig, is now admitted and read in evidence, subject to objections to be made by defendants.

And thereupon, at the hour of twelve o'clock noon, It Is Ordered that the further trial of this case be continued until two o'clock p.m. this date to which time the Jury, being first duly admonished by the Court the [17] parties and their counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Patsy O'Rourke Kendig is now recalled and further examined in her own behalf.

The defendant Mary Boone Kendig's exhibit A, letter, is now admitted in evidence.

Plaintiff's exhibit 2, photostatic copy of affidavit is now admitted in evidence.

Plaintiff's exhibit 3 for identification, photostatic copy of confidential report is now read in evidence and restored to file of Veterans Administration.

Ralph E. Palmer is now sworn and examined for the plaintiff.

Whereupon, the plaintiff rests.

And thereupon, at the hour of 2:35 o'clock p.m., the Jury, being first duly admonished by the Court,

is excused until Wednesday, October 29, 1947, at ten o'clock a.m.

Counsel for the defendant, Mary Boone Kendig, now moves to strike portions of plaintiff's exhibit 1 on ground that same is hearsay and conclusion of witness and moves for dismissal. Charles B. McAlister, Esquire, counsel for the Government, joins in said Motion to Strike and moves for dismissal of cause of action on account of insufficient evidence.

It Is Ordered that the said motions be submitted and by the Court taken under advisement.

And thereupon, at the hour of 3:15 o'clock p.m. It Is Ordered that the further trial of this case be continued to ten o'clock a.m., Wednesday, October 29, 1947, to which time the parties and counsel are excused.

On motion of Charles B. McAlister, Esquire.

It Is Ordered that the Veterans Administration be allowed to withdraw Exhibit A of the defendant, Mary Boone Kendig, on substitution of a photostatic copy thereof. [18]

[Title of District Court and Cause.]

Minute Entry of Wednesday, October 29, 1947

ORDER GRANTING DIRECTED VERDICT

Honorable Dave W. Ling, United States District
Judge, presiding

The Jury and all members thereof, the parties and their counsel being present pursuant to recess, further proceedings of trial are had as follows:

Gene Cunningham, Esquire, on behalf of the defendant, Mary Boone Kendig, now moves for directed verdict, and

It Is Ordered that motion for directed verdict be and it is granted and the jury is instructed to return a verdict for the defendants. Whereupon, Robert W. Goldwater is now appointed as Foreman and signs and presents the following verdict:

“Patsy O’Rourke Kendig, a widow, plaintiff, against Mary Boone Kendig, a widow, and United States of America, Defendants.

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendants.

ROBERT W. GOLDWATER,
Foreman.”

The verdict is read as recorded and the Jury is discharged from the further consideration of this case and excused until further order. [19]

[Title of District Court and Cause.]

Minute Entry of Friday, November 7, 1947

ORDER APPROVING FORM
OF JUDGMENT FOR DEFENDANTS

Honorable Dave W. Ling, United States District Judge, presiding.

It is ordered that the form of judgment for the defendants, approved as to form by all counsel herein, be filed, entered and spread upon the minutes as the judgment herein as follows:

Civ. 863. Patsy O'Rourke Kendig, Plaintiff,
vs. Mary Boone Kendig, a widow, and United
States of America, Defendants.

Judgment for Defendants
On Directed Verdict

This cause came on for trial before the court and a jury on the 28th day of October, 1947, all parties appearing by counsel; and the court, on motion of the defendants, having directed the jury to render a verdict for the defendants, and the jury having done so, in words as follows:

“We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendants.”,

It Is Hereby Ordered, Adjudged And Decreed that the plaintiff take nothing, that the action be and it hereby is dismissed on the

merits; that the defendants have and recover from the plaintiff their costs in the action; and that the defendants have execution thereof.

Done in open court, this 7 day of November, 1947.

DAVE W. LING,
Judge.

Approved as to form:

GUST-ROSENFELD-
DIVELBESS-ROBINETTE
& LINTON,
By HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

CUNNINGHAM, CARSON,
MESSINGER & CARSON
By GENE CUNNINGHAM,
Attorneys for Defendant,
Mary Boone Kendig.

FRANK E. FLYNN,
United States Attorney for
the District of Arizona,

By CHARLES B. McALISTER,
Attorney for Defendant,
United States of America.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Ratsy O'Rourke Kendig, and moves the court to set aside the verdict and the judgment entered herein, and to grant plaintiff a new trial, for the following reasons:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and evidence in the case.
4. The court erred in granting the defendants' motion for a directed verdict, upon the ground that the evidence offered by the plaintiff was insufficient, for the reason that the evidence was sufficient to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had sent in to the Veterans' Administration a change of beneficiary from his mother, Mary Boone Kendig to his wife, Patsy O'Rourke Kendig.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,
Attorneys for Plaintiff.

Received copy of within this 15th day of November, 1947.

CUNNINGHAM & CARSON
CHARLES B. McALISTER,
Att. U. S. Atty.

[Endorsed]: Filed Nov. 15, 1947. [24]

[Title of District Court and Cause.]

Minute Entry of Tuesday, January 13, 1948

**ORDER DENYING PLAINTIFF'S MOTION
FOR NEW TRIAL**

Honorable Dave W. Ling, United States District Judge, presiding.

Plaintiff's Motion for New Trial having been submitted and by the Court taken under advisement,

It Is Ordered that said Motion for New Trial be and it is denied.

(Notation entered in civil docket 1/13/48.) [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Patsy O'Rourke Kendig, the plaintiff, does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from that certain Judgment rendered in the above entitled Court and cause on the 7th day of November, 1947, said judgment being entitled, "Judgment for Defendants on Directed Verdict," and from the Order denying plaintiff's Motion for New Trial, made and entered on the 13th day of January, 1948.

Dated the 30th day of March, 1948.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,
Attorneys for Appellant,
Patsy O'Rourke Kendig.

[Endorsed]: Filed Mar. 30, 1948. [26]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That I, Patsy O'Rourke Kendig, the plaintiff above named, as principal, and Fidelity and Deposit Company of Maryland, as Surety, am held and firmly bound unto Mary Boone Kendig, a widow, and United States of America, defendants above named, in the sum of Two Hundrd Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to the said Mary Boone Kendig, a widow, and the United States of America, for which payment well and truly to be made I bind myself and my heirs, representatives and assigns, firmly by these presents.

The Condition of This Obligation Is Such That,

Whereas, a certain Judgment, entitled, "Judgment for Defendants on Directed Verdict," was rendered and entered on the 7th day of November, 1947, in the above entitled court and cause, and

Whereas, the Court on the 13th day of January, 1948, [27] entered an order denying plaintiff's motion for a new trial; and

Whereas, the judgment and order were in favor of the above named defendants and against the principal on this bond; and

Whereas, the said principal has appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from said judgment, and from the order denying plaintiff's motion for a new trial;

Now, Therefore, if the said principal above named shall prosecute her said appeal with effect, and shall pay all costs which have accrued in the United States District Court for the District of Arizona, and which may accrue in the United States Circuit Court of Appeals, for the Ninth Circuit, then this obligation shall be void; otherwise, it shall remain in full force and effect.

In Witness Whereof, said principal and surety have executed these presents on this 27th day of March, 1948.

/s/ PATSY O'ROURKE KENDIG,
(Principal).

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON

By /s/ HAROLD L. DIVELBESS,
Attorneys for Appellant,
Patsy O'Rourke Kendig.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
Surety.

[Seal] By C. A. DRUMMOND,
Attorney-in-Fact.

[Endorsed]: Filed Mar. 30, 1948. [28]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD AND PROCEEDINGS TO BE CONTAINED IN RECORD ON APPEAL.

Comes now the above named plaintiff and appellant, and designates the following portions of the record and proceedings to be contained in the record on appeal:

1. Complaint.
2. Answer of Defendant, Mary Boone Kendig, to Complaint.
3. Answer of Defendant, United States of America, to Complaint.
4. Verdict of Jury.
5. Judgment for Defendants on Directed Verdict.
6. Plaintiff's motion for new trial.
7. The Clerk's notation of Judgment in the civil docket.
8. Final Judgment, as entered by the Clerk in the Civil Order Book.
9. All Exhibits marked for identification, or received in evidence, in the case.
10. The Reporter's Transcript.
11. All Minute Entries made by the Clerk in said cause. [29]
12. Notice of Appeal.
13. Bond on Appeal.
14. This Designation.

Dated this 31st day of March, 1948.

GUST, ROSENFELD,
DIVELBESS, ROBINETTE
& LINTON,
By /s/ JAMES C. ENGDAHL,
Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Mar. 31, 1948. [30]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF CERTAIN
ORIGINAL EXHIBITS AND REPORTER'S
TRANSCRIPT TO CIRCUIT COURT
OF APPEALS.

Counsel for the appellant having designated that all exhibits marked for identification or received in evidence herein, together with the Reporter's Transcript, be contained in the record on appeal in this case, and it appearing to the court that the original of defendants' exhibit A in evidence has been withdrawn from the files and a photostatic copy substituted in lieu thereof; that plaintiff's exhibit 3 for identification has been read into the record and restored to the files of the Veterans Administration, and that plaintiff's exhibit 1 in evidence, to wit, the Deposition of George Kendig is fully set out in the Reporter's Transcript filed herein,

It Is Ordered that the Clerk of this Court be and he is authorized and directed to transmit to the

United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal herein, the original of the Reporter's Transcript, the original of plaintiff's exhibit 2—photostatic copy of Affidavit of George Kendig; and the substituted photostatic copy of defendants' exhibit A—letter dated February 28, 1944 to Bureau of Naval Personnel from Patsy Kendig, in lieu of copies.

Dated at Phoenix, Arizona, this 4 day of May, 1948.

DAVE W. LING,

United States District Judge.

[Endorsed]: Filed May 4, 1948. [31]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona.—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Patsy O'Rourke Kendig, a widow, Plaintiff vs. Mary Boone Kendig, a widow, and United States of America, Defendants, numbered Civ-863 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 32, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, excepting the Reporter's Transcript and all exhibits marked for identification or received in evidence in the case.

I further certify that the original of the Reporter's Transcript and the original of plaintiff's exhibit 2, and the substituted photostatic copy of defendants' exhibit A are transmitted herewith and made a part of the record on appeal in said case pursuant to order of the court.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$8.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 5th day of May, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the District Court of the United States
for the District of Arizona

No. Civil 863

PATSY O'ROURKE KENDIG, a widow,
Plaintiff,
vs.

MARY BOONE KENDIG, a widow, and UNITED
STATES OF AMERICA,
Defendants.

REPORTER'S TRANSCRIPT

Phoenix, Arizona, October 28, 1947

Appearances:

For the Plaintiff: Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton, by Mr. Linton and Mr. Divelbess.

For the Defendants: Messrs. Cunningham, Carson, Messinger & Carson, by Mr. Cunningham and Mr. Messinger; Mr. Charles B. McAlister, Assistant United States Attorney.

Louis L. Billar, Shorthand Reporter, Phoenix, Arizona.

The above entitled and numbered cause came on duly and regularly for hearing before the Honorable Dave W. Ling, Judge, United States District Court, at Phoenix, Arizona, presiding with a jury, commencing at the hour of 10:00 o'clock, a.m., on the 28th day of October, 1947.

The plaintiff was present and represented by her

attorneys, Messrs. Walter Linton and Harold Divelbess, of Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton.

The defendant, Mary Boone Kendig, was present and represented by Messrs. Gene S. Cunningham and W. H. Messinger, of Messrs. Cunningham, Carson, Messinger & Carson.

The defendant, United States of America, was represented by Mr. Charles B. McAlister, Assistant United States Attorney.

The following proceedings were had:

The Clerk: Civil 863, Phoenix. Patsy O'Rourke Kendig, plaintiff, versus Mary Boone Kendig and the United States of America. The case is for trial.

The Court: Ready?

Mr. Linton: The plaintiff is ready.

Mr. Cunningham: The defendant, Mary Boone Kendig, is ready, if the Court please.

Mr. McAlister: The defendant, United States, is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward.

(Thereupon 18 jurors were called, examined on their voir dire by the Court and counsel, after which 12 jurors were selected to preside during the trial after being first duly sworn.)

The Court: You may proceed, gentlemen.

Mr. Linton: May it please the Court, and ladies and gentlemen, at this time I will read you the complaint in this action, omitting the caption which you have heard before.

(Thereupon the complaint was read to the jury by Mr. Linton.) [2*]

Mr. Cunningham: May it please the Court, I will read the answer of the defendant, Mary Boone Kendig.

(Thereupon the answer of the defendant Mary Boone Kendig was read to the jury by Mr. Cunningham.)

Mr. McAlister: Gentlemen, I will read the answer of the United States on the complaint that was filed.

(Thereupon the answer of the defendant United States of America was read to the jury by Mr. McAlister.)

The Court: Do you wish to make an opening statement?

Mr. Linton: I do, your Honor.

The Court: All right.

Mr. Linton: May it please the Court, and ladies and gentlemen of the jury, I want to make a brief statement generally on what the evidence of the plaintiff in this case will prove.

The complaint has been read to you and the answer has been read.

At this time I want to give you the facts on the allegations in the plaintiff's complaint, and the facts which we intend to prove.

Our evidence will show that Wiley Kendig and Patsy O'Rourke had gone together as sweethearts

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

some time before the war; they were college sweethearts at Tempe. He went into the Service in about 1941 and was a Naval flyer. He was a Lieutenant Junior Grade at the time of his death. In '43, in November, he came to [3] Phoenix and he and Patsy O'Rourke were married. At that time they went back to where he was stationed, I believe in Norfolk, and that he was killed on March 23rd, 1944, about four months after their marriage.

As I stated in the complaint, a child was born in November, 1944. Our evidence will show that, and as some of you know, a confidential report of flyers is filed with the Commanding Officer. Our evidence will show a confidential report was filed before the marriage, which said the beneficiary was his mother: "Are you satisfied with the beneficiary?" The answer is, "No." We will also show that shortly after their marriage; in fact, in January, 1944, the deceased had a crash in an airplane, but miraculously escaped without anything more than minor scratches. Prior to that time our evidence will show that he discussed with his wife that he was intending to immediately change the beneficiary to his wife, and that this air crash brought the realization to him that such things did happen, and that shortly thereafter he told his wife he made a change of beneficiary, and informed his wife that same day that he had sent in the forms to the Government to change the beneficiary to his wife, Patsy O'Rourke Kendig.

Our evidence will further show that a few days before his death, his brother George Kendig, his

younger brother, who was stationed somewhere over in Atlantic City, somewhere in New York, came down one day to visit him and he had not seen him for some time, and our evidence will show that he told his own brother that day, the son of the defendant, that he had sent in a change of beneficiary form to the Government to change the beneficiary from his mother to Patsy O'Rourke Kendig.

Our evidence will further show that there was considerable trouble—probably still is confusion—in the Veterans Administration National Service Life Insurance Department, that Wiley Sorrell Kendig did everything in his power to change the beneficiary to his wife. For some reason those forms cannot be located, but our evidence will further show that there was a confidential report which was opened by the Commanding Officer in the presence of his wife two days after his death. In that report it said: "Who is the beneficiary of your National Service Life Insurance?" And it said, "Patsy O'Rourke Kendig, Wife."

That, ladies and gentlemen, will be the main issues of the case, that he sent in a form to the Government, that he made that statement immediately thereafter to his wife that he had sent the change of beneficiary form; that the first time upon seeing his brother after that, he told his brother, "I sent in the form [5] changing the beneficiary from my mother to my wife," which the brother will testify to, and that on the confidential report it showed that the beneficiary was Patsy O'Rourke

Kendig, and that, ladies and gentlemen, will be the evidence given you by the plaintiff in this case.

Mr. Cunningham: If the Court pleases, could the defendant, Mary Kendig, be permitted to reserve a statement until the close of her case?

Mr. McAlister: The same for the defendant, United States Government.

The Court: Yes. Call your first witness.

PATSY O'ROURKE KENDIG

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Linton:

Q. Will you state your name to the jury?

A. Patricia O'Rourke Kendig.

Q. And you are the plaintiff in this suit?

A. I am.

Q. You are a widow? A. I am.

Q. In other words, you have not remarried? [6]

A. I have not.

Q. And you are the widow of Wiley SoRelle Kendig? A. I am.

Q. And Wiley SoRelle Kendig is now deceased?

A. He is.

Q. When did you first know Wiley?

A. We met October 9th, 1939, shortly after I went to Tempe to school.

Q. And where was he at that time?

A. He was in school at Tempe.

Q. Did you see him often after that date?

(Testimony of Patsy O'Rourke Kendig.)

A. Practically constantly.

Q. Do you know of your own knowledge when he went into the Service?

A. Yes, it was around July 15th, 1941, before Pearl Harbor.

Q. Had he finished his college education?

A. He had, yes, just prior to that.

Q. And when did you graduate?

A. I didn't.

Q. Were you a freshman in college when you first met him? A. Yes, I was.

Q. Did you see him often after he went into the Service in 1941?

A. Only on his leaves. I think they were about every six months.

Q. Did you have any correspondence with him while he was gone?

A. At times. Most of the time. I still retain such correspondence.

Q. And do you know of your own knowledge where he was located from 1941 until, say, November, 1943?

A. For about three months of his primary training he was in Long Beach and then he was sent first to Miami, I believe, and then to Norfolk, where he entered fighter training, and shortly after that he didn't go on for fighter training, he became an instructor at Jacksonville, and in November of 1942, I believe, he was transferred to Cuba as a patrol—in a patrol squadron, and he was there for 13 months.

(Testimony of Patsy O'Rourke Kendig.)

Q. Did he get home any time while he was in Cuba?

A. No, he was there all the time. I only saw him on his transfer from Cuba to Norfolk. He came to Phoenix and we were married and we went to Norfolk.

Q. When was the date of your marriage?

A. November 29th, 1943.

Q. And was that here in Phoenix?

A. Yes.

Q. Then from here you say you left for Norfolk?

A. Yes.

Q. How long were you in Norfolk? [8]

A. We were there one month.

Q. And where did you go from Norfolk?

A. We were transferred to Atlantic City.

Q. Then you went to Atlantic City about the first of the year, 1944?

A. Yes, it was January 1st, to be exact, 1st or 2nd.

Q. What was his rate in the Navy at the time you married him, do you remember?

A. Lieutenant, Junior Grade.

Q. And he was a flyer? A. Yes.

Q. Was his brother also in the Navy, his younger brother George?

A. Yes, George was a Midshipman at the time he talked to Wiley prior to his being commissioned as an Ensign.

Q. When you went to Atlantic City where was George stationed?

(Testimony of Patsy O'Rourke Kendig.)

A. George was at Ithica at Cornell University.

Q. I understand George was younger than Wiley? A. Yes.

Q. Approximately how much younger?

A. Oh, let's see, three or four years, I believe.

Q. Now, prior to January, 1944, between the date of your marriage in November and January, 1944, did you have any discussion with your husband regarding [9] National Service Life Insurance? A. Prior to January?

Q. Yes.

A. Only slightly—only slightly. We were to be transferred soon, and at one time he said, "Well, I am going—I must get my papers all cleared up before I go out." At that time that is what he stated.

Q. That was before January? A. Yes.

Q. Now, did anything happen in the month of January, unusual, in his training?

A. January 5th he had a terrible crash, mid-air collision. Both of the boys came out of it fine, and, oh, approximately a week after that, he made the statement again, well—

Mr. Cunningham: Just a moment, we object to that as hearsay, if the Court please.

Mr. Divelbess: Your Honor, if you have any doubt in mind about the admissibility of this, we would like to argue on the matter.

The Court: Oh, I think it is admissible.

Mr. Cunningham: May I have the Court's ruling?

(Testimony of Patsy O'Rourke Kendig.)

The Court: She may answer.

A. He had this crash and he said, well, something to the effect that, "Well, I guess it could happen to me." He was very confident in his flying and he felt [10] just as sure, I guess, as everybody else, that nothing was going to happen. He was never a bit afraid of flying, and this crash, I believe, certainly had—well, I wouldn't say it frightened him exactly—

Mr. Cunningham: I object, that is merely a conclusion of the witness.

The Court: Yes.

Mr. Linton: Yes.

The Court: That is not material.

A. He said he was going to change it right away, though.

Mr. Cunningham: We move to strike that for the reason it is hearsay.

The Court: Yes, that is a voluntary statement.

Mr. Cunningham: We move to strike it.

The Court: All right, it may be stricken.

Q. (By Mr. Linton): Patsy, do you know from any conversation that you may have had during the month of January or February whether or not the beneficiary on this life insurance policy had been changed? A. He came to me—

Mr. Cunningham: Just a moment, please—excuse me. May I have that read?

(The question was read by the reporter.)

Mr. Cunningham: I withdraw the objection.

(Testimony of Patsy O'Rourke Kendig.)

The Witness: He stated—he came to me and made [11] the statement to me—

Mr. Cunningham: No, the question was did you have any discussion.

Q. (By Mr. Linton): Did you have any discussion? A. Yes, yes.

Q. You had some discussion with Wiley about that change? A. I did.

Q. Do you know when that was?

A. Well, it was in latter January.

Q. When you were in Atlantic City?

A. Yes.

Q. Do you know whether or not the beneficiary on the policy was changed at that time?

A. From—only from what he said.

Q. Will you state the conversation?

Mr. Cunningham: Now, we object to it as calling for hearsay, if the Court please.

The Court: She may answer.

A. He stated—he came to me and he stated, "I have changed"—"that the insurance has been changed, I have made the change. Everything is settled."

Mr. Cunningham: I move to strike it, if the Court please, on the ground it is hearsay.

The Court: It may stand.

Mr. Cunningham: May I request that exceptions be [12] preserved?

The Court: It is not required under the new rules.

Q. (By Mr. Linton): Did you ever see the

(Testimony of Patsy O'Rourke Kendig.)
beneficiary form at any time he was talking about it? A. No, I didn't.

Q. Did Wiley, to your knowledge, at any time during his service with the Government, have any clerical positions?

A. Yes, most of the officers, I believe, that do become officers, are given certain desks—

Mr. Cunningham: If the Court please, we object to that as not responsive to the question.

The Court: Yes, it may be stricken.

Mr. Linton: Will you read the question?

(The question was read by the reporter.)

The Witness: Yes.

Q. Do you know of your own knowledge what that consisted of?

A. Yes, he worked on the books in Ship Service in Cuba.

Q. Do you know of your own knowledge whether or not he had any clerical position requiring him to be familiar with the National Service Life Insurance? A. I do not.

Q. Now, after your marriage to Wiley, when was the first time you saw George Kendig? [13]

A. George accompanied me home with Wiley's father.

Q. You had not seen him, then, until November, until after the crash? A. No, I had not.

Q. Do you know whether or not, of your own knowledge, whether Wiley and George had seen each other from the time of your marriage until the date of Wiley's death? A. Yes.

(Testimony of Patsy O'Rourke Kendig.)

Q. Do you know where that was?

A. Atlantic City.

Q. Do you know approximately the date?

A. Yes, I know exactly the date, March 11th.

Q. Were you there at that time?

A. I was not.

Q. And where were you?

A. I had gone and spent the weekend with friends in Philadelphia.

Q. Then, as I gather it, George spent the weekend with Wiley? A. Wiley, alone, yes.

Q. Patsy, where was this crash in which Wiley was killed? A. Near Tucahoe, New Jersey.

Q. And he was killed as a result of an airplane crash? A. Yes. [14]

Q. And what was that date?

A. March 23rd, 1944.

Q. Did you at any time thereafter have occasion to check the records or check with the Commanding Officer of the Base there regarding Wiley's death and his papers, or anything of that nature?

A. Yes, we discussed them.

Q. Will you relate generally what you learned?

Mr. Cunningham: Just a moment, please. I don't want to stop you until you finish your question.

Mr. Linton: Go ahead.

A. I—

Mr. Cunningham: Just a moment, please. Have you finished your question?

Mr. Linton: Yes.

(Testimony of Patsy O'Rourke Kendig.)

Mr. Cunningham: If the Court please, I object to that as calling for hearsay.

The Court: She may answer.

A. I learned, first, that the widow of a deceased Naval veteran was the natural beneficiary to his six months—well, they call it “death gratuity,” six months death gratuity. That is the regular continuation of their pay for six months, that I would receive any and all funds that he had left in his account. They had a regular account where they drew out their salary, and they could leave it in a sort of a bank account [15] until they wished to use it. I learned that I would receive that just naturally, and that on my question to the Commanding Officer as to what condition the life insurance was in, was that taken care of, he said—

Mr. Cunningham: Just a moment, please. I object to the answer, to this portion of it as relating to hearsay testimony. She is now going from what she learned to relating what was stated to her by some person.

The Witness: Well, he made the statement.

The Court: Just a minute. Did you see any of his papers that contained that statement? Did you read his confidential report?

A. Yes, he showed me the confidential report.

Q. What did that say about life insurance benefits?

A. It said—well, to the question which said, “Do you have insurance?” he said, “Yes.” “With which Company?” or approximately that. He said, “Government.” It says “beneficiary?”—“wife.”

(Testimony of Patsy O'Rourke Kendig.)

Q. (By Mr. Linton): Do you recall, in seeing that report, whether or not it was dated—do you recall whether that report was dated?

A. I don't remember.

Q. And when was the conversation, and when was the time that you saw the confidential report?

A. It was March 25th, two days after Wiley was killed. [16]

Q. Where was that located?

A. In the Commanding Officer's office at Atlantic City.

Q. What was the name of the field?

A. Pomona, yes, they call it Pomona.

The Court: We will have a brief recess at this time. During the recess, you are not to discuss this case among yourselves or permit anyone to discuss it with you, also avoid forming or expressing any opinion upon any subject connected with it.

(Thereupon a short recess was taken.)

PATRICIA O'ROURKE KENDIG

resumed the witness stand and testified further as follows:

Mr. Linton: You may cross-examine.

Mr. Cunningham: No cross-examination, if the Court please.

Mr. McAlister: I believe I would like to ask some questions—(conferring inaudibly with counsel)—no questions.

The Court: That will be all.

(The witness was excused.)

Mr. Linton: At this time I would like to offer in evidence the deposition of George Kendig.

Mr. Cunningham: We have no objection to it going into the record, except pursuant to the agreement under [17] which it was taken, that in the reading of it we will be permitted to make such objections to questions as they are propounded, and answers, as we go along. Do you see any objection to that?

Mr. McAllister: No.

Mr. Cunningham: If the Court please, the deposition is preceded by the usual agreement, that the objections may be reserved until introduction.

The Court: All right.

(The document was received as Plaintiff's Exhibit No. 1 in evidence.)

Mr. Divelbess: I will take the stand and let Mr. Linton propound the questions to me and you can make your objections.

Mr. Cunningham: Either way, it is all right.

(The following is Plaintiff's Exhibit 1 admitted in evidence, being the deposition of George Kendig, taken on the 24th day of September, 1947, before L. W. McCreight, a Notary Public in and for Dallas County, Texas, at Dallas, Texas:)

“Agreement. It is further agreed by and between the parties hereto through the attorneys appearing herein that any and all objections as to any questions or answers contained herein may be

made upon the offering of this deposition in evidence upon the trial of this cause with the same force and effect as [18] through the witness were present in person and testifying from the witness stand.

“GEORGE KENDIG,

the witness named in the caption hereof, being first duly cautioned and sworn, testified as follows:

Direct Examination

By Mr. Churchill:

Q. Would you state your full name please?

A. George Kendig. (Spelling) K-e-n-d-i-g.

Q. How old are you? A. Twenty-five.

Q. You are married? A. I am.

Q. What is your wife's name?

A. Johnnie A. Kendig. Do you want it full?

Q. Yes. A. Anderson.

Q. Where do you live?

A. 2823 Hawthorne.

Q. That is here in Dallas? A. Yes.

Q. What do you do here in Dallas?

A. I am a dental student, Baylor Dental College.

Q. Were you in the Service during the recent war? A. I was. [19]

Q. In what branch? A. Navy.

Q. Was your brother Wiley Sorrell Kendig, was he in the Navy also? A. He was.

Q. Where were you stationed when you were in the Navy?

(Deposition of George Kendig.)

A. Do you want a list of the various stations?

Q. Were you stationed at Atlantic City?

A. I was not.

Q. Were you there at any time?

A. I was, to visit him.

Q. Your brother was stationed there?

A. Yes, he was.

Q. You visited with him there?

A. That is true.

Q. And you talked to him? A. Yes.

Q. Did you discuss with him or did he discuss with you his government life insurance?

A. It was not a topic of discussion. It was made just a point in the conversation. I wouldn't say it was a topic of conversation.

Q. But did he mention it?

A. It was mentioned during the course of the conversation. [20]

Q. But he did say something about it?

A. Yes.

Q. Would you briefly state what he mentioned about the life insurance?"

Mr. Cunningham: I object to that, if the Court please, that is objectionable on the ground it is hearsay.

The Court: He may answer.

Mr. Linton: Do you want to read the objection?

Mr. Cunningham: I wasn't really depending on that. I made the original objection and the Court overruled it.

(Deposition of George Kendig.)

“A. I am not sure any more than you are of remembering what was said three years ago. Maybe you can, but I can’t. I can state what is on that affidavit, if you would like I will read it off.

Q. What did you say during that conversation, if you remember?

A. I will read it off the affidavit if that is all right. I can’t remember it. My mind isn’t that sufficient and I think it would be much more appropriate if I would just read it. That certainly is more pertinent than what I say now because it was two years since I made the affidavit. That sounds logical to me. I don’t know whether it is to you or not.

Mr. Churchill: I was just wondering if it would be [21] all right for him to read it?”

Mr. Cunningham: Yes. I don’t know whether the Court would permit it or not. I’d say “yes” quickly, but if you will explain to the Court what it is.

Mr. Linton: There is a conversation between counsel during the taking of this deposition. If it is agreeable we can leave most of that out.

Mr. Cunningham: I think so, because I do not make any objection that we can rely on at this time.

The Court: All right.

“Q. Can you state about what he said during the conversation?

A. I just read the affidavit. If I remember correctly I made some statement to the effect that he

(Deposition of George Kendig.)

had—That statement is so much better, the affidavit; why not let me read it? I will let it refresh my memory. I don't think that is out of the question."

Mr. Linton: Then will you read the answer on Line 7? I think that is still a part of the answer.

"A. The best I remember is what is on that affidavit.

Q. Well, can you just say that?

A. If I can see the affidavit.

Mr. Churchill: I think the other attorney would object to it. A. Do you object? [22]

Mr. Seay: Yes, we object."

Mr. Linton: Read the next line, 14.

"All I have to say is I don't remember anything I said.

Q. Shortly after you talked to your brother there in Atlantic City—that was about in 1944?

A. Yes, about.

Q. And then shortly after that he was killed?

A. That is correct.

Q. How was he killed?

A. In a plane crash.

Q. After that do you know who was receiving the proceeds of his insurance policy?

A. I don't know when I was informed of that. I was informed of that by my wife while I was overseas.

Q. What were you informed?

A. That my mother was receiving the benefits from the National Life Insurance policy.

(Deposition of George Kendig.)

Q. Was that sort of a surprise to you that she was receiving the proceeds?

A. In view of the conversation, yes.

Q. What was the conversation?

A. The conversation with my brother.

Q. What did he say then?"

Mr. Cunningham: We object to that, if the Court please, calling for hearsay. [23]

The Court: He may answer.

"Q. What did he say?

A. He objects to letting me have the statement. I hope I can reduplicate it but I will say it was his intention to submit some form of notification to the National Life Insurance Company to the effect of the change of the beneficiary.

Q. From whom?

A. From his mother Mary Sorrell Kendig to his wife Patsy O'Rourke Kendig. Does that sound like the affidavit?

Q. Well, he stated to you in that conversation that he had an intention of filing this change of beneficiary?

A. No. I had better say he said, "I sent in a form to change the beneficiary", and his intentions with that form was to change the beneficiary. It was the purpose of the form. Does that sound better?

Mr. Churchill: I believe that's all.

Cross-Examination

Mr. Seay:

Q. Mr. Kendig, was your brother Wiley Sorrell

(Deposition of George Kendig.)

Kendig older or younger than you? A. Older.

Q. How much older than you was he? [24]

A. 3 years and 7 months if I figure it correctly.

Q. About how old would that make him when he was killed?

A. I think he was 24 when he was killed; his birthday was in March.

Q. Had he been in the Navy long?

A. Since 1941.

Q. What was his rank in the Navy?

A. Lieutenant J. G., Lieutenant Junior Grade.

Q. He was commissioned a Naval Officer?

A. Yes, sir.

Q. Did he have wings? A. He did.

Q. He was a Naval pilot? A. Yes.

Q. Where had he gone to school?

A. Arizona State College, Phoenix, Arizona.

Q. Did he specialize in any particular type of study or was it a B.A. degree?

A. It was a Bachelor of Arts. I don't know whether he majored—I think he majored in geology.

Q. He did get a degree in that college?

A. Yes, he did.

Q. As a matter of fact to be a Naval Officer you have got to have a degree from some college?

A. No, that is incorrect. They took them in the [25] last part of the war, they took them with two years of college.

Q. Before you can become an officer you have to go through a course and qualify. Certainly in a pilot's school you have to take a training course?

(Deposition of George Kendig.)

A. I think it applies to all courses.

Q. After he graduated from this college had your brother taken any further post graduate work in schools of any kind before applying to the Navy?

A. No. He entered the Navy soon after he received his degree.

Q. Did he do any work that you remember after he got his degree?

A. Well, only in so far as his college training—I mean he didn't enter any occupation of any kind.

Q. He didn't enter any business? A. No.

Q. Had he done any work along in the college?

A. Yes, he had at least partial support by working at what was called a Varsity Inn, a place where the students hang out.

Q. In the Navy did he have any particular occupation before he got through the pilot school?

A. No, he entered in the pilot training and emerged a pilot and carried on as a pilot after that.

Q. In the Army Air Corps it takes the pilot something [26] like 9 weeks of pre-flight and nine weeks of primary and nine weeks of basic and nine weeks of advanced, that is 36 weeks and ten more even before they get their wings and after they get their wings they take some patrol training, maybe transition training on heavy type aircraft and then they take a specialized combat course and of course went on the aircraft carriers so it would take him—

A. 13 months of training, that is correct.

A. And he was a regular Naval pilot?

A. Reserve Naval pilot.

(Deposition of George Kendig.)

Q. He had gone through all that training and been stationed at bases after getting his wings?

A. Uh-huh.

Q. You saw him you say up there at—

A. —at Atlantic City.

Q. —at Atlantic City. By the way, what was your position in the Navy? A. Ensign.

Q. Were you a line officer? A. Yes.

Q. Were you commissioned at the time you saw him? A. Yes, I was. I was on duty.

Q. Were you down there on just a short visit?

A. That's correct, very short. I don't think I visited with him over one day. [27]

Q. Did you hop a ride down there?

A. Yes, I went down to see him.

Q. Did you get a ride on a Navy plane?

A. No, I didn't.

Q. You just went down to the base?

A. Uh-huh.

Q. Were you married at the time?

A. No, I was not.

Q. Of course, this time that you saw him sometime in 1944 had been a long time ago, hasn't it?

A. That is correct.

Q. And very naturally you can't remember exactly what was said?

A. I can't remember anything that was said and I wouldn't say that because I did make some statement.

Q. As a matter of fact, you can't say positively anything that was said on that occasion?

(Deposition of George Kendig.)

A. No, not now, I couldn't.

Q. In other words, your mind is blank on it?

A. Well, not blank, no. I still have facility to remember three years ago. I can remember when I was a child. It certainly isn't a blank.

Q. Sure, but as to exact words?

A. Exact words is correct.

Q. And of course, what independent recollection you have of it now is solely based on your discussion with [28] Mr. Churchill prior to this deposition?

A. I would say refreshed prior to reading the affidavit.

Q. Before you came into the deposition you did read some affidavit you mentioned, is that correct?

A. Not before; I had that after I got here?

Q. After you got in the office where we are taking the deposition you did read the affidavit?

A. Yes, I did. Is that contrary to anything, Mr. Churchill?

Q. You are not asking Mr. Churchill to tell you what to say, are you?

A. No. I just want to know what he said.

Q. You don't want to do anything to hurt his feelings but are you relying on him to tell you what to say up here in the hearing?

A. I can make a short answer: No.

Q. Mr. Kendig, you don't profess to be able to say what is in another man's mind, do you?

A. No, I am not capable of that.

Q. Don't you know none of us can say what is in another man's mind, frankly?

(Deposition of George Kendig.)

A. I am not capable. Perhaps you are.

Q. I don't think I am either. Of course, I am asking you as a witness under oath.

A. I made the statement "No." [29]

Q. You would not attempt to testify what was in another man's mind, would you?

A. No. Would you?

Q. In your studies in the Navy you learned through your contact with the Navy that the armed forces of the United States had a death gratuity for relatives of people killed in the Service?

A. Would you be more explicit?

Q. You know about the death gratuity is six months pay after a man being in the Service is killed, his dependents or beneficiaries are advanced six months of his base pay including his flying pay and longevity that he would get as subsistence?

A. Yes, I think I have heard it.

Q. That and the base pay; you remember that that is a benefit which a man is entitled to from being in the Service. You knew about that, in the Service, the enlisted man?

A. Yes, the base pay.

Q. Six months advanced base pay after his death, did you know about that? A. Yes.

Q. What I mean is on a man's death did you know that he was entitled to get six months' advance pay? A. Yes, I did.

Q. Did you know that some time in 1944 your brother [30] Wiley Sorrell Kendig changed this

(Deposition of George Kendig.)

death gratuity from his mother to his wife? Did you know about that? A. No, I didn't.

Q. You yourself never saw any written letter or written instrument of any kind pertaining to any beneficiary of your brother, did you?

A. No, I didn't.

Q. Of course, you are not testifying that any such instrument was posted in the United States mails or by the Army base, you know nothing about that? A. Nothing about that.

Q. All that you know and now recall is what you have testified on direct examination as to your impression as to what Wiley Sorrell Kendig's intention was?

A. No. That is incorrect. I can testify to the statement he made to me to the effect that he had sent in a change of beneficiary from his mother to his wife, sent that form in to the National Insurance Agency or whatever the agency is.

Q. You say, "Whatever it is." What do you mean by National Insurance Agency?

Mr. Churchill: Do you mean the National Life Service?

A. Yes.

Q. (By Mr. Seay): On Mr. Churchill's suggestion you now testify National Service? [31]

A. Not Mr. Churchill's suggestion. The reason I didn't say it correctly is I am not sure what the correct name of it is. I am not sure and if you are sure I would like to be enlightened on it.

Q. As far as you are concerned you don't re-

(Deposition of George Kendig.)

member what agency was mentioned at the time, do you?

A. Yes, the agency with which he and I both and every man in the Armed Forces had a policy which it is, I think it is the National Life Insurance something, I don't know, Agency. I maintained the same policy. I had the same policy.

Q. Well, your policy wasn't mentioned in the conversation? A. No, sir.

Q. And as to any form that you talked about, you never saw any form and don't know what form was being referred, do you?

A. Only in that there was a special form which is called a change of beneficiary form with which you are supposed to change your beneficiary, and I assume that is what he meant. I can't say what it was, as you say, I never saw any instrument to that effect.

Q. And you, as a matter of fact, don't know whether the reference was to the form for this death gratuity?

A. I certainly do. He said his policy with the National Life Company. [32]

Q. Now, you are repeating something. You say "he said." You didn't say that at first on your direct examination. You said you couldn't repeat it.

A. You are confusing. Will you make that statement over again?

Q. I asked you if you said that on direct examination as to his exact words. You are now quoting

(Deposition of George Kendig.)

some exact words. Is that what you are now doing? Are you quoting the exact words, or is that your impression?

A. I repeat, on meeting my brother some time in 1944 during the course of the conversation my brother made the statement he had sent in a form to change his life insurance policy with the National Life Insurance Company or Agency, I might as well make it that because I am not sure, from his mother Mary Sorrell Kendig to his wife Patricia O'Rourke Kendig, unquote.

Q. Where were you when that conversation took place?

A. Riding in a 1942 Chevrolet in some street in Atlantic City.

Q. What makes you place that so positive as to where you were?

A. I made the statement where I was. I don't know what makes me remember that. You asked me a statement and I gave you all a correct answer.

Q. You say you couldn't remember exactly what was said but you do remember exactly where it was said, is [33] that right?

A. I can't remember the exact words, that is correct, but I can't remember the streets either.

Q. As far as your memory goes at this time you could have said, "I am going to send it?"

A. No, I couldn't; he said, "I did."

Q. Now, you are positive about that, although you have been telling us you can't remember it?

(Deposition of George Kendig.)

A. Those aren't his exact words.

Q. That was your impression?

A. No, it wasn't an expression. It was a statement.

Q. Of course, nothing was said about when that was done, was there? A. Certainly not.

Q. Nothing was said about where he was when he did it? A. No.

Q. And nothing was said about whether he made it out or somebody else made it out?

A. He said, "I." "I sent the form in." He used the first person.

Q. He said "I sent?"

A. That's correct, he said, "I sent."

Q. He didn't say, "I made it out," or anything like that?

A. I can't remember the exact words. [34]

Q. So when you can't remember exactly; it is very possible he said he was doing it, isn't it?

A. No, he said, "I sent," or to that effect. No, I will leave it he said, "I sent."

Q. You are now remembering the exact words?

A. Yes, sir.

Q. Those two? A. I will testify to that.

Q. "I sent"? A. Uh-huh.

Q. But you don't want to testify to any other words after this long period of time now, do you?

A. Must I repeat it again?

Q. You don't have to ask Churchill for your answers.

A. I wasn't talking to Mr. Churchill.

(Deposition of George Kendig.)

Q. You were looking right at him. You pointed at him.

A. Did I address him or did I say Mr. Churchill?

Q. It looked like to me you did.

A. Did I?

Q. You didn't say Mr. Churchill, but you pointed at him and asked him the question.

A. Nevertheless, I could have been pointing at the wall.

Q. Maybe you were. How did you happen to be talking [35] about this subject?

A. I repeat again in the course of the conversation the subject arose.

Q. You don't know how you happened to be talking about it? You didn't ask him this specific question, did you?

A. No, in the course of the conversation the subject arose.

Q. You don't remember any of the other conversation? A. No.

Q. You won't testify as to any other conversation you had with him at the time?

A. No.

Q. Either before or after—— A. No.

Q. —this conversation. This form or paper referred to you yourself don't know what was in it, do you?

A. You will have to be more explicit.

Q. You said something about your brother said something about a form. You don't know what was in the form because you never saw it?

(Deposition of George Kendig.)

A. I never saw the instrument, that's correct. We discussed that previously.

Q. You don't know actually that there was any such form, do you? Actually now you don't know?

A. Now, we are going back. Shall we go back to the instance of my brother? Shall we do that? My brother made the statement to me and trusting me and I will trust my brother and certainly I am not going to distrust him. I would have no reason to.

Mr. Fonville: What was the question in that connection?

(The question referred to was read by the reporter as follows: "You don't know actually that there was any such form, do you? Actually now you don't know?")

Q. (By Mr. Seay): There was nothing said about how any form was sent, was there?

A. He could have sent by pony express, I suppose, I don't know.

Q. There was nothing said about how it was sent, was there? A. No.

Q. By what means and what method, whether by pony express or what?

A. I certainly don't know. The natural assumption is always by mail, United States Mail.

Q. I am not asking you for your natural assumptions, of course. Have you been giving us your assumptions of those facts?

A. As a statement of fact, I think you implicate it.

(Deposition of George Kendig.)

Q. Of course, you don't want to testify anything was sent by U. S. Mail, do you? [37]

A. I certainly don't.

Q. There was no statement made to that effect whatsoever?

A. The answer is again "no."

Q. There wasn't any more discussion about that other than in the course of the conversation this came up and you told us all that was said?

A. That is correct.

Q. And you don't recall that positively, do you, except the words, "I sent"?

A. I made a statement of fact and I will repeat the statement of fact if necessary.

Q. Well, do you now want to say when you told us you couldn't recall exactly, do you want to say you do recall exactly and positively?

A. Naturally not. I said I can't recall the exact words and I repeat I can't recall the exact words of the entire conversation; I can't recall the exact words. I can't recall the street we were riding on.

Q. You recall nothing else about the particular transaction? A. Pardon?

Q. You recall nothing else about it, about this particular transaction?

A. What do you mean, "Nothing else?"

Q. Other than what you have already told us?

A. That's right. I am making a deposition on that affidavit. Is that not correct?

Q. Making what?

(Deposition of George Kendig.)

A. A deposition on the affidavit. Is that not correct?

Q. You mean you are just repeating now what you recall what in an affidavit that you looked at?

A. No. I understood I was to appear this afternoon at five o'clock and make a deposition on an affidavit. Am I correct?"

Mr. Cunningham: I would like at this point, if the Court please, to reserve, and I think to save time at this point, where the answer is: "No, I understood I was to appear this afternoon at five o'clock and make a deposition on an affidavit—" and again in the four lines ahead of it—"That's right. I am making a deposition on that affidavit." May I reserve the right to make my objection at the close of this deposition when I will again point your Honor's attention to that? I have a motion to make and it will save time.

The Court: All right.

"Q. Were you served with a subpoena?

A. I was not served with a subpoena, no.

Q. Did somebody tell you to appear here and give your deposition on an affidavit?

A. That's right. Mr. Churchill— [39]

Mr. Churchill: I don't believe I said—

Q. (By Mr. Seay): That is what you understood you were doing?

A. Yes, that is correct.

Q. The affidavit you have reference to is some—

(Deposition of George Kendig.)

A. The purpose of my being here was to make a deposition on an affidavit. It was the purpose of my presence here.

Q. And so what you have given us in this testimony is based on that purpose?

A. Yes. That is my main purpose to give my deposition on the affidavit, my main and only purpose.

Q. Did you say you were attending school here?

A. That is correct.

Q. Where are you going?

A. Baylor Dental School.

Q. Are you now a resident of Dallas or here just taking that course?

A. Well, what differentiates residence from a non-residence?

Q. I am not trying to be technical with you. What I want to know is where you say you live. Where is your home?

A. I reside in or board out here at 2823 Hawthorne.

Q. Do you consider yourself a Texan—

A. I was born— [40]

Q. —or Arizonian?

A. I was born in Escondido, California, September 21, 1922.

Q. Are you a Californian? All I want to know is where you call your home, your permanent address.

A. I would rather not make that statement. Do I have to?

(Deposition of George Kendig.)

Q. No, if you want to refuse.

A. I don't think it is pertinent. I don't think I will answer it.

Q. All right. You then refuse to answer it.

A. Is it possible to get a drink of water?

Mr. Seay: That is all right with me. Let's adjourn a minute.

(At this time a short recess was taken.)

Mr. Seay: That is all.

Cross-Examination

By Mr. Fonville:

Q. Mr. Kendig, did I correctly understand you on direct examination to testify you had no independent recollection of the conversation?

A. Will you clarify that? I perhaps understood you but don't understand your statement.

Q. What I mean by that, I will say this, did I understand you to testify on direct examination you [41] had no other recollection of the conversation?

A. If I made the statement naturally it is entered.

Q. Maybe you didn't understand my question. I don't think I quite finished. Let me repeat it. I stated that I understood on direct examination you testified that except as it appears in the affidavit, in other words by reading the affidavit you have now no independent recollection of the conversation—

A. I am not sure.

Q. ——I didn't finish my question. Did I correctly understand you?

(Deposition of George Kendig.)

A. You want a correct answer on it?

Q. Yes. Maybe I am mistaken.

A. Well, it could be proven by this little document here, I suppose.

Q. I don't think you understood me.

A. You said did I understand you—

Q. You mean the reporter's notes?

A. Yes.

Q. It will take time to refer back to it. That is the reason I asked you.

A. I imagine I might say it.

Q. Will you go back to the direct examination, the latter part and advise me whether your notes show the witness, in answer to the question as to a conversation with his brother, what answer he made to that. There [42] were several questions and answers and I wish you would read that passage.

Mr. Seay: Mr. McCreight, I might suggest that it was covered on direct examination.

A. Let me ask a question, what is direct examination?

Mr. Fonville: That is the first one.

A. And the rest is superfluous?

Mr. Fonville: The first is direct examination and the other examinations are called cross.

(The direct examination beginning with Page 6, Line 22, and ending with Page 8, Line 1, was read by the Notary.)

Q. (By Mr. Fonville): Do you have an inde-

(Deposition of George Kendig.)

pendent recollection of the conversation of which we have been talking about?

A. On direct examination as you say I made the statement "No."

Q. I will ask you, without reference to direct examination, affidavits, or any other instruments of any kind, do you now independently have any recollection of the conversation?

A. Upon refreshment may I ask you a question?

Q. If you will listen to my question, I think you can answer it. Let me ask it again: Do you now, at this time, independently of affidavits or any refreshment [43] of your memory, have any independent recollection of that conversation?

A. I must give a direct answer, either "yes" or "no"?

Q. I would like one. That is what my question is designed to ask, "yes" or "no." If you can't answer it "yes" or "no," you can so state.

A. Would you mind restating it after I ask a question of you?

Q. Yes, you can ask it.

A. Do you think it is possible for a person, without refreshing his memory, after two years, recall, we will say, recall pertinent happenings, recall those happenings?

Q. We are getting into a very interesting discussion but that is not the function of this examination. My question is: Independent of any refreshment of your recollection by that affidavit or otherwise, have you now, at this moment, an independent recollection of this conversation?

(Deposition of George Kendig.)

A. I will make the statement "No."

Q. During your examination on direct, I forget whether it was on direct or cross, I believe it was on cross—

A. In other words I said the words "I sent."

Q. Those you refer to specifically you remember. Will you repeat to me now what you repeated at that time? [44]

A. The thing I can't understand is if I made one statement—

Q. Will you answer my question?

A. You want me to make a statement and if I make this statement it will be in direct contradiction of the last statement I made.

Q. Are you concerned with the effect of your testimony?

A. No. I am concerned with the statement I make. I want to tell the truth.

Q. I just asked you a question. Would you repeat for us? A. Repeat what I said?

Q. Yes.

A. I told you, Mr. Seay, is that your name—that the words "I sent" I remembered. I remember the words "I sent" independent knowledge.

Q. Let me ask you that, are you quoting the affidavit to us?

A. I can't quote that affidavit.

Q. Are you attempting to quote that affidavit?

A. No, I am not attempting to quote the affidavit.

Q. Will you repeat in full what you recall of the conversation with your brother? A. Yes.

(Deposition of George Kendig.)

Q. Will you repeat it? [45]

A. Quote: While meeting with my brother in Atlantic City sometime in 1944—It may not be a good sentence—During the course of the conversation my brother made the statement I have sent in a form to change my life insurance policy—I will continue—Change my National Life Insurance policy from the beneficiary which is my mother Mary Sorrell Kendig to my present wife Patricia O'Rourke Kendig. Unquote.

Q. You began your statement there with quotation marks and ended it with quotation marks. Are you quoting your recollection of your affidavit?

A. No, that is myself. I made the statement.

Q. When you began with the quotation marks and ended with the quotation marks do you mean for us to understand that is a quotation from your brother?

A. No, I don't mean that. That is my quotation.

Q. Will you tell us as well as you recollect now the words that he used, as well as you recollect them? I realize it has been a long time but will you tell us as well as you recollect the words he used in telling us what you have told us in the answer to the last question?

A. I am confused, but I will make a statement. I sent in a form to the National Life Insurance Company to change the beneficiary of my policy from my mother Mary Sorrell Kendig to my wife Patsy O'Rourke Kendig, or probably I had better say Patricia. [46]

(Deposition of George Kendig.)

Q. His mother is also young, is she?

A. Yes.

Q. Is she your mother?

A. With my study of genetics and eugenics I think a person is only capable of having one mother. Maybe I may be wrong.

Q. You perhaps misunderstood me. Is she your natural mother or your stepmother? You could have a stepmother, I don't know, and that is the reason I asked it.

A. My mother.

Q. Mr. Kendig, whom did you first tell after that conversation that your brother had told you this?

A. Undoubtedly—No, wait a minute—Now you are making me—My wife, my wife.

Q. How came you to give an affidavit in the matter?

A. To express the wishes of my brother—No—

Q. You are giving me your reasons. If you will listen to my question you will find the particular answer I desire. My question is how came you, not your reasons?

A. That would certainly be a reason.

Q. All right. At whose request did you give the information?

A. Patsy O'Rourke Kendig.

Q. That is your brother's widow?

A. Yes, sir. [47]

Q. When did she request you to do that?

A. That, I can't answer; I don't know. She made a request.

(Deposition of George Kendig.)

Q. What did she ask you in respect to that?

A. I don't remember.

Q. When did she ask you?

A. I don't remember.

Q. How did she know, if you know, that you had any such information to include in an affidavit?

A. I don't remember that.

Q. Do you know? A. No, I don't know.

Q. This conversation with your brother in Atlantic City, what was the date of that conversation?

A. The exact date?

Q. The best you can do for us.

A. Oh, I will say February 15th, 1944.

Q. What time of day or night did it occur?

A. I don't remember.

Q. Would it be in the daytime?

A. I don't remember.

Q. If you don't remember whether it was in the daytime, do you recall it was night?

A. It would have to be one of the two.

Q. And you don't remember? A. Yes.

Q. And you were in an automobile at the time?

A. Yes.

Q. Who was driving? A. He was.

Q. Was it his automobile? A. It was.

Q. Where were you going?

A. Down a street in Atlantic City.

Q. I understand that, but your destination?

A. No destination.

Q. Where had you been?

A. No recollection of previous activities.

(Deposition of George Kendig.)

Q. How come the subject of the conversation of your brother's National Service Life Insurance policy?

A. I can't recall why it was brought up. It was in the course of the conversation.

Q. You can't recall any other point in the conversation? A. No.

Q. Are you interested in the outcome of this particular lawsuit?

A. I am certainly not interested in the outcome in any way. You can underscore that if you wish.

Mr. Fonville: I have no further questions. [49]

Redirect Examination

By Mr. Churchill:

Q. I will just ask you a couple or three questions, Mr. Kendig, in order to simplify maybe a few of the statements you made. In regard to the residence which you now have I don't know whether Mr. Seay meant domicile or residence. A residence means where you hang your hat.

A. That is what he asked; he asked where I was now residing.

Q. That means where you would hang your hat?

A. That's right.

Q. Domicile means something else, physically present where you make your home, but you are just residing at the place you stated before?

A. That's correct.

Q. Another question, in regard to the type of insurance which you had or your brother rather had,

(Deposition of George Kendig.)

now, we veterans call it flat G.I. insurance. That is what you were receiving? A. Yes.

Q. The common name of the G.I. insurance?

A. I said it was identical to that type of insurance I had.

Q. And you had just the plain G.I. insurance?

A. That's right. [50]

Q. Now, in regard to this when you were talking about we were going to take a deposition on your affidavit this afternoon?

A. Yes, sir. In the first place I don't know the connotation of depositions.

Q. A deposition is what we are doing now, just a lot of questions and you know there is a lot more to it than was in the affidavit. You are giving your answers on direct and cross examination?

A. I realize that now.

Q. Did you have the impression when you came down here that you were just supposed to memorize an affidavit, just recite it? A. No.

Q. You knew that you were just going to be asked questions regarding your brother?

A. I think I asked you what a deposition was and you furnished the information it was to determine my character, not character, no, determine who I am possibly, I think you said that.

Q. That is part of the deposition.

A. You also said something about confirming that I made that deposition.

Q. The statement?

A. Confirm the statements in the deposition.

(Deposition of George Kendig.)

Q. Just to see if you remember things that had been [51] said by your brother to you?

A. No, I don't think you said that.

Q. Now, in regard to what Mr. Fonville asked you about independent recollection, in other words, do you remember what your brother said to you?

Mr. Seay: Just a minute. We object to counsel going back over the testimony in such away as to put the words in the witness's mouth as to what he wants him to testify. We think that is a conclusion and suggestion and if you have any direct questions I won't object to it.

Mr. Churchill: I was trying to clarify the question; that was confusing at the time. He was using technical words.

Mr. Seay: You can ask him the question what his independent recollection is."

Mr. Cunningham: Just a minute. We object to it as leading.

The Court: You what?

Mr. Cunningham: I say, we won't insist on that.

"A. I asked you, Mr. Fonville, what the definition of it was.

Q. (By Mr. Churchill): What was your understanding, independent recollection, about?

A. Independent recollection, I believe you said was without the aid of any instrument, refreshers or any [52] form of instrument that would recall the subject to me. Is that right?

Mr. Fonville: You are quoting one of my questions to you?

(Deposition of George Kendig.)

A. Yes, and I, in turn, asked you to please define independent recollection, and that you did.

Q. (By Mr. Churchill): You can remember what your brother said to you?

Mr. Seay: Just a minute. We object to that as leading.

A. Independent recollection? No.

Q. (By Mr. Churchill): You do remember, do you remember just about what your brother said to you?

Mr. Seay: We object to that as going back over the same thing, Mr. Churchill, and a conclusion.

Mr. Churchill: That is enough questions.

Recross-Examination

By Mr. Seay:

Q. I have just another question.

A. This is cross-examination, perhaps?

Q. Yes, it will be cross-examination. You have testified in response to Mr. Fonville's question that you made an affidavit at the request of Patsy O'Rourke Kendig?

A. Yes, yes, that's correct. [53]

Q. Did she make that request in person or talking to you orally or did she write you about it?

A. I am unable to say.

Q. You don't remember the circumstances about it? A. That's correct.

Q. But you do remember she asked you to make an affidavit?

A. (Witness nods head.)

Q. Speak out. A. Yes.

(Deposition of George Kendig.)

Mr. Fonville: He can't get the nod of your head.

Q. (By Mr. Seay): Mr. Kendig, who actually prepared this affidavit you refer to?

A. I don't recall the man's name, the officer's name.

Q. Was it typewritten when handed to you? Do you remember that?

A. Well, I remember making the statements on the affidavit and they were verbal, to a yeoman.

Q. The point is you didn't write it out in long-hand yourself? A. No, no, I didn't, no.

Q. And you have always, in response to Mr. Fonville's questions, stated you were riding in an automobile and you remember your brother was driving and you remember nothing of the event leading up to this conversation. I will ask you whether or not you recall anything [54] subsequent to the conversation as to where you went or anything pertaining to that activity with your brother?

A. Well, he asked me specifically where I was, where I was going, and I can't remember that. I can remember while visiting him I went to his house and we went to dinner somewhere and came back to his house and we drove on the Atlantic City streets during that time and we drove in his automobile and he drove the automobile.

Q. And that is all you remember about it?

A. Yes.

Q. You only stayed a day on the visit down there with your brother, I believe you said?

A. 24 hours.

(Deposition of George Kendig.)

Q. Are there any other persons you have talked to about—— A. Yes, my wife.

Q. Is that all?

A. The person who took the affidavit, Mr. Churchill, Mr. Fonville, Mr. Seay, and your name, we are discussing it now.

Q. Of course, when you talked to Mr. Fonville and Mr. Seay and Mr. McCreight you never saw us before we walked in this door taking the deposition?

A. No, but we discussed it now.

Q. You have never discussed it with us previously? [55] A. No.

Q. And the only persons you recall discussing the affidavit with before this deposition hearing was your wife and the officer that took the affidavit, and Mr. Churchill?

A. And one other. I don't remember his name. He was a Chaplain on the base.

Q. He was what? A. The Chaplain.

Q. How did you happen to talk to him about it?

A. I don't remember the incidents that preceded.

Q. Were you doing it for advice or something like that about whether you should make such an affidavit? A. No, I didn't.

Q. You don't remember why you happened to talk to him? A. No.

Q. Was it before or after? A. Before.

Q. Before you made the affidavit?

A. Yes.

Mr. Seay: That's all.

Mr. Fonville: That's all.

Mr. Churchill: That's all.

(Signed) GEORGE KENDIG. [56]

Subscribed and sworn to before me by the said witness, George Kendig on this the 29 day of September, A. D. 1947.

[Seal] (Signed) L. W. McCREIGHT.

Notary Public in and for Dallas County, Texas."

The Court: We will suspend until two o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12:00 o'clock noon).

2:00 o'Clock P.M.

(All parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: Call your next witness.

Mr. Cunningham: If the Court please, before we get too far away from a point that occurred to me during the lunch hour, may I be permitted to ask one or two questions of Mrs. Kendig?

The Court: Yes.

Mr. Cunningham: It is something I really overlooked, and I apologize for it, but I would like to ask one or two questions of Mrs. Kendig before I get too far.

Mr. Linton: You mean the plaintiff?

Mr. Cunningham: Yes, the plaintiff. [57]

PATRICIAL O'ROURKE KENDIG

resumed the witness stand and testified further as follows:

Cross-Examination

Mr. Cunningham:

Q. Mrs. Kendig, on your examination and the testimony you gave before the lunch hour, you stated, I believe, that you had a conversation with your husband at a time when he told you that the insurance had been changed, or things had been taken care of? A. Yes.

Q. Words to that effect? A. Yes.

Q. Do you recall where that conversation might have been had?

A. Well, I said before I thought it was in February—wait—January, but on reconsidering, it was around in the middle part of February and at that time it was made in the presence of a friend who also—

Q. Afterwards, however, say, in the month of March, 1945, you wrote to the Department, the Insurance Department at Washington, didn't you, the Bureau of Naval Personnel?

A. I beg your pardon?

Q. Concerning this subject?

A. When was that? [58]

Q. That was about March, say, March—well, say the 20th of March, 1945.

A. I had a great deal of correspondence with the Department, and I believe it was around in that time.

Q. Do you recall writing to the Bureau of Naval

(Testimony of Patricia O'Rourke Kendig.)

Personnel about the same subject on the probability of the insurance having been changed as to the beneficiary named? A. Yes, I do.

Q. And at the time you wrote to the Department, it was after, of course, you had had the conversation with your husband? A. Yes.

Q. So that you recall—first, may I show you an instrument, please, and ask you whether or not this is in your handwriting?

A. Yes, that is in my handwriting.

Q. That is in your handwriting? A. Yes.

Q. And that is dated February—

A. 28th.

Q. 28th, 1944? A. Yes.

Q. But that should have been February 28th, 1945, shouldn't it? A. Yes, it should have.

Q. Now, at that time, when you wrote this letter to the Bureau of Naval Personnel, you didn't at that time advise them that you had had a conversation with your husband to the effect that the beneficiary had been changed, had you?

A. No, I don't believe I advised them of that.

Q. In writing to the Bureau of Naval Personnel on February 28th, 1945, you stated that your information—

Mr. Divelbess: Do you offer that in evidence?

Mr. Cunningham: —as to any change had come from George Kendig, the brother of your husband, didn't you?

A. Well, I don't remember just what I wrote to them, but the information that George knew about

(Testimony of Patricia O'Rourke Kendig.)

it came to me—didn't come directly from George, but that is what I was informing them in trying to back up my statement that I believe the change had been made.

Mr. Cunningham: Well, let me show you this instrument again and just read it or familiarize yourself with it, please, Mrs. Kendig. It is very short, (handing document to the witness).

(The witness reads the document.)

Mr. Divelbess: Your Honor, I might suggest that the letter be first offered in evidence and he can examine her concerning it.

The Court: All right, better have it marked, Mr. Cunningham. [60]

Mr. Cunningham: Yes, I think that is right.

The Witness: Well—

Mr. Cunningham: Just wait a minute, the Court wants me to ask you another question.

A. All right.

Mr. Cunningham: Since this is a part of the official file we will ask permission that it be photostated and a photostatic copy be substituted if it is agreeable with counsel in the case.

Mr. Linton: All right.

The Court: All right.

Mr. Cunningham: May this be marked then, if the Court please, as a part of Defendant Mary Kendig's cross-examination?

(Thereupon the document was marked as Defendant Kendig's Exhibit A for identification.)

(Testimony of Patricia O'Rourke Kendig.)

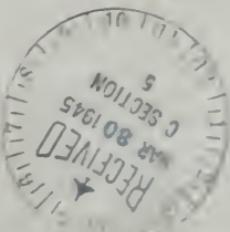
Mr. Cunningham: Well, I will offer it in evidence.

Mr. Divelbess: No objection.

(The document was marked as Defendant Kendig's Exhibit A in evidence.)

Dest. Kendig A
Kendig Kendig, et al
Civ. 2-373 bx

✓ 00. 201547
= John 14 Surveillance
=



81
Chairman of Naval Personnel
Washington, D.C.

717 W. Latham
Phoenix, Arizona

Telephone 8-5454

Re: Kendig, Wiley S.

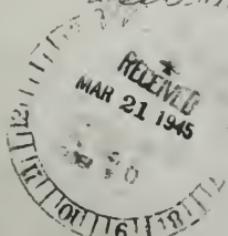
BUREAU OF NAVAL PERSONNEL
NAVY DEPARTMENT

RECEIVED

114-3985 114-3985 85-3a

Gentlemen: Kendig, Wiley S.
114-3985

Would you please be kind enough to check
the file of the above named veteran to determine
whether or not there is a change of beneficiary
made out in my behalf? I was told
by my husband's brother that he had made
a beneficiary to his government insurance
policy and I believe this change probably had
not been sent in to the Veterans Administration
at the time of his death. Therefore, I think it
is possible this form might be in your file.
I would appreciate an immediate reply.



Very truly yours, ^{RECEIVED}
MAR 1945
Wiley Kendig, Jr.
(Son of Wiley Kendig)

P.S. I might add that, at the time of

my husband's death, I was shown his personal file by his commanding officer, Lt. Colonel Torel, who stated that all papers were in order. I saw the Chancery Clericals slip to me, insurance).

If I may be of any further assistance you in finding ^{for} this information, so far as we know, the Veterans Administration Insurance Division is also working this case.

F. C.



(Testimony of Patricia O'Rourke Kendig.)

Q. (By Mr. Cunningham): Now, I show you Defendants' Exhibit No. A, Mrs. Kendig, and ask you again, at the time of writing—this is a letter from you to the Bureau of Naval Personnel at Washington, D. C., is it not? A. Yes. [61]

Q. And it is dated February 28th, 1944?

A. It should have been '45.

Q. But that should have been— A. '45.

Q. '45.

A. Because I didn't find out about it until '45.

Q. Now, at that time when you wrote to the Government you didn't have—you didn't recall having had that conversation with your husband, to the effect that the beneficiary in his life insurance policy had been changed to you?

A. Had been changed. Well, I hadn't gotten direct information from George—I mean I—he had not been as definite. I mean, he just kept repeating definitely that Wiley said he had changed it, and at this time I was not sure he had made such a definite statement, but I am positive that my husband told him that he had changed it.

Q. Then— A. He didn't tell me—

Q. At this time you told the Department that you were told by your husband's brother that he had made you the beneficiary to his Government insurance policy? A. Yes.

Mr. Cunningham: That is all, and may I read the letter as a part of the cross-examination, if the Court [62] please?

The Court: Yes.

(Testimony of Patricia O'Rourke Kendig.)

(Thereupon Defendant's Exhibit A in evidence was read to the jury by Mr. Cunningham.)

Mr. Linton: Are you through, Mr. Cunningham.

Mr. Cunningham: Just excuse me a minute.

Q. Mrs. Kendig, was that the time when you were referring to in this Defendants' Exhibit A as having seen the report, is that when you saw the confidential report that you spoke of this morning?

A. I don't quite understand. Would you repeat that question, please, when I saw—yes.

Q. "P.S." A. Oh, yes, I know now.

Q. You know now?

A. Yes, that was the time I saw the confidential report.

Q. That was the time?

A. That was the only time, until Representative Harless got the form for us and I identified it as being the same one that I had seen at the base.

Q. But that was the time when you saw that file which you testified to as being the confidential report this morning?

A. Yes. May I make a statement, please?

Q. Yes. [63]

A. At the time that I said this possibly was in the Naval Personnel files, I wasn't aware of the fact that George Kendig had said that he had sent it in to the Veterans Administration.

Q. Well, Mrs. Kendig, as you say, at the time you were not aware. You made an affidavit and sent it in to the Department, didn't you, when you

(Testimony of Patricia O'Rourke Kendig.) claimed this insurance, or made a claim for it, didn't you make an affidavit and send it in?

A. I don't recall. I sent in my application for it.

Q. Well, that is—all right, you made an application for this insurance? A. Yes.

Q. And set forth such facts as you had for the purpose of supporting your claim? A. Yes.

Q. And at that time you didn't make in that affidavit or that claim any statement that you had had such a conversation with your husband, did you?

A. I thought I did because I have other testimony here.

Q. Do you have a copy of that—is it conceded that she didn't make that statement?

A. I don't believe I made an affidavit.

Mr. Cunningham: Will you let me have a copy of it, or will you concede that she made that statement? Is [64] this a copy of it? All I want to do is let her look at it.

Mr. Linton: It is perfectly all right (handing document to attorney).

Mr. Cunningham: Counsel have furnished me with a carbon copy of an affidavit that they say I might use merely for the purpose of getting an answer to this question.

Q. Do you recall you made an affidavit, of which this seems to be a copy, Mrs. Kendig?

A. Yes, I made this affidavit.

Q. Do you recall when it was made?

A. Well, it was made after I started receiving counsel.

(Testimony of Patricia O'Rourke Kendig.)

Q. Some time in October, 1945, would it be?

A. Yes.

Q. At least, it was in the month of October, 1945? A. Yes.

Q. And after examination of that would you now say you made any showing or statement that you had had the conversation with your husband that the beneficiary in the insurance had been changed? A. Yes, it was at this time.

Q. But you made no such statement at that time in your affidavit, did you; you made no such statement that you had had a conversation with your husband, [65] Wiley Kendig?

A. Let me read that just a moment, please (looking over document). He stated to me, as his wife—that is my affidavit—that he made the beneficiary to me as his wife, and my friend was there at the time, Mrs. Tommie Ruth Faulkner. That is my affidavit that he made that, telling—where he said—I mean we had this conversation in the presence of a witness.

Mr. Cunningham: All right, that is all, if the Court please.

Redirect Examination

By Mr. Linton:

Q. Mrs. Kendig, in other words, what you were referring to there when you were talking to Mr. Cunningham is this second paragraph?

A. Yes.

Q. Where you state: "That the said J.G. Grade Wiley Sorrell Kendig, during his lifetime and in

(Testimony of Patricia O'Rourke Kendig.)
the presence of Tommie Ruth Faulkner, stated that he had changed the beneficiary in his National Life Insurance Policy to me as his wife?"

A. Yes, that is right.

Q. That is the statement you are referring to?

A. Yes.

Q. In other words, you had told them then that you [66] had had a conversation with your husband before his death?

A. I did in that affidavit.

Q. Now, I show you here a photostatic copy of an affidavit and ask you if you can identify that signature, if you know anything about that affidavit? A. Yes, I have seen the affidavit.

Q. And do you know approximately when the affidavit was made? A. In September, 1945.

Q. In September, 1945, and whose affidavit is that? A. This is George Kendig's affidavit.

Q. Then that was after your letter of February, 1945, to the Naval Personnel? A. Yes.

Q. And was that affidavit made at your request, or how did you happen to come into possession of the original of that photostatic copy?

A. I wrote a letter to my brother-in-law and asked him if he could make an affidavit on what he was claiming was my husband's statement on that.

Q. And do you know where the original of that affidavit is, the photostatic copy of which you have in your hand?

A. It is in the file, isn't it?

Q. In what file? You mean the Government file?

A. Government file.

(Testimony of Patricia O'Rourke Kendig.)

Q. In other words, you don't have it in your possession? A. I have not.

Q. That, I believe, was sent in to the Government along with your claim for benefit?

A. Yes.

Mr. Linton: May this be marked for identification?

(The document was marked as Plaintiff's Exhibit 2 for identification.)

Mr. Linton: We offer this in evidence, your Honor, to show that the affidavit was not—

Mr. McAlister: May we see it?

Mr. Linton: Certainly. I think you have the original there.

Mr. Cunningham: We object on the ground it is purely hearsay and it is covered by some things in that deposition read this morning, being an affidavit made by George Kendig while he was in the hospital in San Francisco, if I recall, and refers only to a conclusion of the witness according to the statement contained—

Mr. Linton: Your Honor, my purpose in offering this affidavit is to show that the plaintiff, at the time of writing the letter of February, 1945, did not at that time have definite knowledge, and it was not until September, 1945, that she knew of the statements [68] of her brother-in-law regarding the change of beneficiary.

The Court: All right, it may be received.

(The document was received as Plaintiff's Exhibit 2 in evidence.)

(Testimony of Patricia O'Rourke Kendig.)

PLAINTIFF'S EXHIBIT No. 2

AFFIDAVIT

State of California,
County of San Francisco—ss.

George Kendig, being duly sworn, deposes and says:

That I am a Lieutenant (j.g.), U.S. Naval Reserve, presently stationed at the U.S. Naval Hospital, Treasure Island, San Francisco.

That I am submitting this affidavit in support of a claim for insurance filed by my sister-in-law, Patricia O'Rourke Kendig, widow of my late brother, Lieutenant (j.g.) Wiley SoRelle Kendig.

That on or about March 18, 1944, at Atlantic City, New Jersey, I had a conversation with my brother, who was stationed at said city as a United States Naval Pilot, in which he stated that he had sent in a form to the United States Veterans' Bureau requesting said bureau to change the beneficiary on his ten-thousand (10,000.) dollar National Service Life Insurance Policy from my mother, Mary SoRelle Kendig, to his wife, Patricia O'Rourke Kendig.

That on March 24, 1944, my brother was killed in a plane accident and since that time my mother has been receiving payments under the above named insurance policy.

That on or about September 1, 1945, payments on said policy were stopped because of a conflict between my mother and my sister-in-law.

(Testimony of Patricia O'Rourke Kendig.)

That I am submitting this affidavit only to carry out the wishes expressed to me by my late brother.

/s/ GEORGE KENDIG.

[Seal]

State of California,
County of San Francisco—ss.

On this 28th day of September, 1945, before me, James C. Healey, the undersigned officer, personally appeared George Kendig, known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same. And the undersigned does further state that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

/s/ JAMES C. HEALEY,
Lieut., D(L), USNR, 328770,
Legal Assistance Officer.

[Endorsed]: Filed Oct. 28, 1947.

Mr. Linton: I'd like to read this to the jury as a part of the plaintiff's examination.

(Thereupon Plaintiff's Exhibit 2 in evidence was read to the jury.)

Mr. Linton: At this time, your Honor, I'd like to make a demand on the defendant, the United States Government, to produce a photostatic copy

(Testimony of Patricia O'Rourke Kendig.)
of the confidential report which has been testified to that was in the files of the Commanding Officer Vorse, which the plaintiff testified she talked to a day or so after the death of her husband. I believe that is on file. We have no copies of it, but the United States Attorney has a photostat of it and I would like to make demand for the production of that copy to use and mark it in evidence.

Mr. Cunningham: May it please the Court, we have no photostatic copy of a document that purports to be the confidential report that was—that is in my file. It is not a part of the usual record in Veterans' cases, I am informed by Mr. Gross that veterans' information, any information they obtain from another [69] division, particularly the Army and Navy, and it cannot be revealed by them.

The Court: Well, Mr. Harless sent this witness a copy of it, why couldn't it be revealed?

Mr. Cunningham: Probably the Army itself could be made to furnish a copy.

The Court: Oh, well, you can read that into the record.

Mr. Cunningham: This is not the original and we have no way of knowing that it is, although there might be some way of identifying it, and Mr. Gross would like to know if it is an order directing him to produce it, as it is in his custody actually temporarily.

The Court: Yes, you can read it into the record and give it back to Mr. Gross.

Mr. Linton: We will have this marked. Your

(Testimony of Patricia O'Rourke Kendig.)

Honor, if counsel wishes this in his file, we will read the information in so he can have it back in his file, is that the idea?

The Court: Yes, that is the idea. If it is not supposed to be divulged, you had better leave those records at home and not bring them into Court.

Mr. Linton: I would like to have it marked for identification. That won't hurt this file?

The Court: No, that won't hurt it.

Mr. Cunningham: Personally, you can put it in the [70] file and withdraw it later.

(The document was marked as Plaintiff's Exhibit 3 for identification.)

Q. (By Mr. Linton): I will show you Plaintiff's 3 for identification and ask you if you can recognize the signature thereon?

A. Yes, it is the signature of my husband.

Q. And I will ask you if you have ever seen the original of that document, if there is anything about that that will identify to you the original document of which this is purported to be a photostatic copy at this time? A. Yes, this is—

Q. Talk louder so the jury can hear you.

A. This is the photostatic copy of the original that was in the Bureau of Naval Personnel file, and it is also the one that was in the—this file was the one that was with Commander Vorse, my husband's commanding officer in Atlantic City, when I looked at it. It was just a paper he showed me when I asked him if the Government insurance

(Testimony of Patricia O'Rourke Kendig.)
was complete, the records were complete, and this
is the one he showed me.

Q. Is that instrument dated—do you see any
date on that that would indicate when it was filled
out? A. February 5th, 1944.

Q. That is dated at the upper right hand corner
of [71] the first sheet?

A. Yes, July, '44 or '45.

Q. '44, that was right, wasn't it?

A. Yes, '44.

Q. I will ask you to read the remaining part
of Sheet 1, beginning with the words, "I hold the
following insurance policies: Answer: The name
of Company: Government; amount, \$10,000; Bene-
ficiary, Wife; Location of Policy: Phoenix, Ari-
zona, with Mrs. Mary Kendig."

Mr. Linton: No further questions.

(The witness was excused.)

Mr. Linton: Mr. Palmer.

RALPH E. PALMER

was called as a witness on behalf of the plaintiff,
and, being first duly sworn, testified as follows:

Direct Examination

By Mr. Linton:

Q. Will you state your name to the jury, please?
A. Ralph E. Palmer.
Q. What is your residence?

(Testimony of Ralph E. Palmer.)

A. 95 West Cypress, Phoenix.

Q. How long have you lived in Phoenix?

A. Off and on since 1925.

Q. Have you at any time been employed by the Veterans Administration in the Insurance Division?

A. I have.

Q. And when and where was that employment?

A. I was sworn in in Washington the 19th of March, 1946, and left the employment about the 1st of May this year.

Q. May, 1947? A. Right.

Q. Now, while you were associated—what was the full name of the department you were in, I may be misquoting names?

A. I was Insurance Officer for this local office.

Q. Of the Veterans Administration?

A. Right.

Q. And as Insurance Officer, do you know anything about the National Service Life Insurance Policies? A. Yes, sir.

Q. I believe you have been in the insurance business before you went into the Service?

A. Since 1920.

Q. How long were you in Washington, D. C., when you first went with the Insurance Division?

A. Four weeks.

Q. And were you working there—did you have an official capacity there, or what was your purpose in [73] being in Washington at that time?

A. We went back there for school instruction, which lasted about two weeks, and then the remain-

(Testimony of Ralph E. Palmer.)

ing two weeks we were around the various departments acquainting ourselves with the routine.

Q. During your time there in Washington, did you have any occasion to observe the condition of the files and the records of the various policyholders of this National Service Life Insurance?

Mr. McAlister: Just a minute. I object to that as it has no particular bearing on the case here, no showing that any change of beneficiary had ever reached Washington as the rest of them did. I don't see that there is any materiality to the testimony of Mr. Palmer here at all.

Mr. Linton: Your Honor, it is our contention that the evidence shows that such change was sent in, and our intention, honestly, in producing this witness, is to show that some state of confusion existed in Washington.

The Court: It always exists in Washington.

Mr. Linton: To check some eighteen million policyholders overnight.

The Court: I do not think it is proper.

Mr. Linton: No further questions.

Mr. McAlister: You do not think it is proper?

The Court: Yes.

Mr. Linton: The plaintiff rests, if your Honor please.

(The witness was excused).

The Court: Well, I will have to hear some arguments of counsel. I think I will excuse you until ten in the morning, and we may dispose of this case in that time without your intervention, so keep in

mind the admonition I gave you and be in court at ten.

(Thereupon the jury was excused).

Mr. Cunningham: Your Honor please, may I proceed to make a motion?

The Court: Yes.

Mr. Cunningham: We believe it to be relevant at this time. I have a memorandum brief which I would like to give to the Court and to counsel at the time I am making my argument, and it will probably allow me to be a little bit more brief in my argument.

If the Court please, in this matter I have rather concluded that as to the motion to strike portions in that deposition because it, in and of itself, defeats itself, and for the further reason that testimony put on in the case might better be considered from the standpoint of two objections: one, that it is purely and wholly hearsay, and second, that it could not be other than a conclusion of George—the deponent, and [75] even a conclusion, if stated in that manner by Wiley, the deceased, the assured.

In this case we have a few words, a very few words, and amplified, it is true, throughout that deposition, upon an assumption, or because of other things that are identified in the manner of testimony—irritator, prompting other things, many of which was, in its final analysis: "I am making this deposition on an affidavit and because of the affidavit and as a result of the affidavit," but as to this objection on hearsay and as to the objection of it being a conclusion, I think we have fully set out in

this brief that the hearsay character of this testimony makes it wholly inadmissible, for the reason that in the event the words "I sent," or "He said he had sent in a form," that is far short of being evidence to the effect that he had made the change of beneficiary. All of the conclusions, all of the results, flow from that, even given the word "form" a presupposition that that was sent. Of course, the requirements under the Act are, first, that it shall be in writing and shall be signed and shall be directed or sent to the War Veterans Bureau, and that it shall contain information sufficient to identify the person asking that the change be made, but there is no evidence in here any place that would support that, and of course, there can be no judicial determination on that [76] unless there is some evidence on which the Court can base its judgment, so in this case the entire testimony as given is purely hearsay; so in this case the entire testimony as given is purely hearsay. Then, if, as I say, there was or could have been added to the words "had sent in a form," and in some place in the deposition it appeared "for the purpose of changing the beneficiary from the mother to the wife," if that could possibly be read into that testimony, then that part, of course, would be a conclusion on the part of the assured himself.

Now, as I say, we have rather set this out fully and we have cited the authorities. A leading case is exactly like this, on all fours, which is *Kingston versus Hines*, and it is cited in there, if the Court please. The other case is one on all fours, that is

the case of Bradley versus United States, in which the lower court felt that this evidence, similar to this, where this same confidential report was admitted to be in dispute would support the intention, and the Court found in the trial that there was something there to permit the change being made, and upon going to the Circuit Court it was analyzed in detail, and they had to reverse that and send it back.

Now, I am willing to submit this on the analysis of these facts as have been shown in this brief without [77] taking a great deal of time of the Court. If, however, we see fit to make any answer to counsel's argument, why, I should like the permission to do that.

The Court: Very well.

(Thereupon further argument between counsel).

Mr. McAlister: I would like to join in the motion made by Mr. Cunningham on the matter of hearsay evidence, and I would also like to further move on the part of the Government that the case be dismissed on the ground that even admitting the hearsay evidence, there has not been sufficient evidence introduced to state a cause of action in the complaint for the relief sought.

(Further argument between counsel).

The Court: All right, I will read your cases and rule on it in the morning.

(Thereupon a recess was taken at 3:15 o'clock, p.m.) [78]

10:00 o'clock, A.M., October 29, 1947.

All parties, as heretofore noted by the Clerk's record being present, including the jury, the trial proceeded as follows:

Mr. Cunningham: If the Court please, for the purpose of the record, may I be permitted to enlarge the motion I made yesterday that the action be dismissed so as to include that the jury be instructed—

The Court: Directed to return a verdict?

Mr. Cunningham: Yes.

The Court: All right. I think the motion should be granted. I don't think the plaintiff has made out a case, so if you will prepare the verdict, I will appoint Mr. Goldwater foreman and ask him to sign it.

(Thereupon the verdict was signed by the juror).

The Court: All right, you may record the verdict.

(Thereupon the trial was ended). [79]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 79 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

[Endorsed]: Filed March 30, 1948.

[Endorsed]: No. 11927. United States Circuit Court of Appeals for the Ninth Circuit. Patsy O'Rourke Kendig, Appellant, vs. Mary Boone Kendig, and United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11927

PATSY O'ROURKE KENDIG,
Appellant,
vs.

MARY BOONE KENDIG and
UNITED STATES OF AMERICA,
Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD FOR PRINTING

Patsy O'Rourke Kendig, the appellant in the above-entitled action, pursuant to Subdivision 6 of Rule 19 of the Rules of the above-named Court, hereby presents the following statement of the points on which she intends to rely on this appeal:

1. That the Trial Court erred in refusing to admit the testimony of Ralph E. Palmer regarding the condition of the files and records of the various policyholders of National Service Life Insurance, for the reason that this testimony would have shown that some state of confusion existed in the handling of Government insurance policies and correspondence and that on occasions forms and correspondence pertaining thereto were lost or misfiled.
2. That the Trial Court erred in granting defendant's motion to direct jury to return a verdict for the defendants, for the reason that the evidence offered by the appellant by means of testimony, deposition and exhibits, was sufficient to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had sent in to the Veterans' Administration a change of beneficiary from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig. [82]

This appellant hereby designates to be printed the whole of the record, including exhibits and Reporter's Transcript, forwarded to this Court by the Clerk of the United States District Court, except the following portions of said record:

Setting case for trial, at page 14 of Transcript of Record

Resetting case for trial, at page 15 of Transcript of Record

Resetting case for trial, at page 16 of Transcript of Record

Verdict, at page 20 of Transcript of Record
Judgment, at page 22 of Transcript of Re-
cord

Dated this 7th day of May, 1948.

GUST, ROSENFELD,
DIVELBESS, ROINETTE
& LINTON.

By /s/ JAMES C. ENGDAHL,
Attorneys for Appellant.

Received copy of the foregoing this 8th day of
May, 1948.

FRANK E. FLYNN,
By /s/ CHAS. B. McALISTER.

Received copy of the foregoing this 8th day of
May, 1948.

CUNNINGHAM, CARSON,
MESSINGER & CARSON,
By /s/ D. EGGERT.

[Endorsed]: Filed May 10, 1948.